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Nos. 95-966, 95-977

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In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS

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QUESTIONS PRESENTED

1. Whether a punitive damages award received by minor children for the wrongful death of their mother in a personal injury lawsuit is excludable from gross income as "any damages received . . . on account of personal injuries . . ." under 26 U.S.C. § 104(a)(2)?

2. Whether the event which commences the two year statute of limitations, 26 U.S.C. § 6532(b), for a suit by the United States to recover a refund erroneously made, should be the issuance or mailing of the refund check by the government or its receipt by the taxpayer?

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ARGUMENT

I. SECTION 104(a)(2) EXCLUDES FROM TAXABLE INCOME THE PUNITIVE DAMAGES AWARD THE O'GILVIE CHILDREN RECEIVED FOR THE WRONGFUL DEATH OF THEIR MOTHER

A. The Tenth Circuit Unnecessarily And Improperly Invoked A "Default" Rule Rather Than Interpret § 104(a)(2)

Like the Tenth Circuit below, the Government in its brief relies on the "principle that exclusions from income must be narrowly construed." Brief for the United States ("U.S. Br.") 9; *see also id.* at 12, 16-17, 32. Petitioners acknowledge that this Court has recognized such a principle. *See, e.g., Commissioner v. Schleier*, 515 U.S. __, __, 115 S. Ct. 2159, 2163 (1995). Petitioners do not agree, however, that the Tenth Circuit properly invoked the principle in this case when that court transformed this general proposition into a so-called "default rule" which, ultimately, was the *sole* basis for the Tenth Circuit's decision. *See* Pet. App. 22a.

In *United States v. Burke*, 504 U.S. 229 (1992), this Court considered the question whether an award of backpay made in settlement of claims under Title VII was excludable from taxable income under § 104(a)(2) as involving a "personal injury." The Court carefully examined the language of § 104(a)(2), the applicable IRS regulations, Title VII and general tort law principles, before concluding that Title VII backpay awards are not excluded from taxable income because they do not redress "tort or tort-type" injuries. *See* 504 U.S. at 233-42. With all due respect, only Justice Souter, in an opinion concurring in the judgment, expressly relied upon the so-called default rule in concluding that § 104(a)(2) should be construed in the Government's favor.[1]

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1. *See id.* at 248 (Souter, J., concurring in the judgment) ("In sum, good

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In *Schleier*, the Court again considered the application of § 104(a)(2), this time in deciding whether liquidated damages under the Age Discrimination in Employment Act are excluded from taxable income. In concluding that they are not, the Court made clear that it was relying solely on "the plain language of § 104(a)(2), the text of the applicable [IRS] regulation, and our decision in *Burke* . . . ." 115 S. Ct. at 2167. The Court's only reference to the narrow construction principle was a general statement made at the very beginning of its discussion of the issue and which quoted Justice Souter's concurring opinion in *Burke*.[2] The Court did not thereafter purport to apply a "default" rule or otherwise suggest that its invocation was necessary to resolve an ambiguity in the statute.

In *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798 (1994), this Court strongly rejected the argument that RICO should be strictly construed in favor of defendants because of "the rule of lenity in criminal cases." 510 U.S. at __, 114 S. Ct. at 806. The rule of lenity, like the narrow construction principle, favors one class of litigants over another but only when the meaning of a statute cannot be determined after careful and thorough inquiry by a court:

> But the rule of lenity applies only when an *ambiguity* is present; "it is not used to beget one . . . . The rule comes into operation at the *end* of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."

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reasons tug each way. It is needless to decide which tug harder, however, for the outcome in this case follows from the default rule of statutory interpretation that exclusions from income must be narrowly construed").

2. *See id.* at 2163 ("We have also emphasized the corollary to § 61(a)'s broad construction, namely the 'default rule of statutory interpretation.' *United States v. Burke*, 504 U.S., at 248, 112 S. Ct., at 1878 (SOUTER, J., concurring in judgment)").

Id. (quoting *United States v. Turkette*, 452 U.S. 576, 587-88 n.10 (1981) (emphasis added)). Indeed, it should be the rare case in which default or narrow construction rules determine the outcome.

Between them, *Burke*, *Schleier*, and *Scheidler* make clear that the Tenth Circuit erred in this case when it relied *solely* on the so-called "default" rule to decide the question whether § 104(a)(2) excludes from taxable income the punitive damages the O'Gilvie Children received for the wrongful death of their mother. Only if the Court remains unable to determine the meaning of the language "any damages received . . . on account of personal injuries," after carefully examining the plain language of the statute, its history, its legislative history, the relevant regulations, and this Court's own decisions interpreting § 104(a)(2), would resort to the narrow construction principle be appropriate. As further demonstrated below, this Court should not find such resort to be necessary in this case.

B. This Court's Decisions Indicate That Punitive Damages Received For Physical Injuries Are "Any Damages Received . . . On Account Of Personal Injuries"

In *Schleier*, this Court declared that two requirements must be satisfied in order to qualify for the exclusion of § 104(a)(2): the taxpayer must establish that (1) the underlying cause of action is based on tort or tort-type rights and (2) the damages were received "on account of" a personal injury. *See* 115 S. Ct. at 2167. There is no dispute that the first requirement is satisfied in this traditional tort case. *See* U.S. Br. 8. The question before this Court is whether the punitive damages in this case were received by the O'Gilvie Children "on account of" personal injuries. This Court's own decisions interpreting the statute strongly suggest that the punitive damages in this case are excluded from taxable income by § 104(a)(2).

The Government begins by correctly observing that in *Schleier* the Court discussed the second requirement — that the damages were received "on account of personal injuries"— in terms of the taxpayer demonstrating that the damages received were "attributable to" the personal injury and that the injury "affected the amount" of the damages received. U.S. Br. 13 (quoting *Schleier*, 115 S. Ct. at 2164). Contrary to the Government's argument, however, the punitive damages the O'Gilvie Children received bear both of those characteristics. Unlike a backpay or liquidated damages award in an ADEA case, the punitive award in this case was made *only* because of the tort committed against the O'Gilvie Children's mother and the resulting physical injuries. In Kansas (the state whose law governed the tort claim) punitive damages are not permissible *unless* there is actual harm to the plaintiff, manifested by either an award of actual (something more than nominal) damages or significant equitable relief.[3] In fact, this is the rule in most jurisdictions.[4] Thus, the punitive award in this case, unlike the ADEA liquidated damages award in *Schleier*, is clearly "attributable to" the underlying injury.

The Government contends that only damages which are legally designated as "compensatory" qualify for exclusion under § 104(a)(2), U.S. Br. 13-16, but this argument is misguided. First, punitive awards generally have a compensatory, as well as punitive, effect and perhaps a compensatory purpose. The edition of Black's Law Dictionary that would have been current when Congress enacted the statute in 1918 says the following about punitive damages:

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3. *See, e.g., Enlow v. Sears, Roebuck & Co.*, 249 Kan. 732, 822 P.2d 617 (1991); *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 861 P.2d 830 (1993); *Capitol Federal Savings & Loan Ass'n v. Hohman*, 9 Kan. App. 2d 217, 675 P.2d 384 (1984), *aff'd*, 235 Kan. 815, 682 P.2d 1309 (1984).

4. *See, e.g.*, W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* 14 (5th ed. 1984) [hereinafter *Prosser and Keeton on Torts*] ("The greater number of courts have said that [punitive damages] are limited to cases in which actual compensatory damages are found by the jury").

> Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and *are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong*, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money." Black's Law Dictionary 314 (2d ed. 1910) (emphasis added).

Nor does it matter that such awards may redress intangible injuries. In *Schleier*, this Court set forth a hypothetical automobile accident to illustrate the kinds of damages that would be received "on account of personal injuries" and therefore excludable under § 104(a)(2). In so doing, the Court declared that "the portion of the settlement intended to compensate for pain and suffering constitutes damages 'on account of personal injuries.'" 115 S. Ct. at 2164. In a footnote, the Court went on to explain that "[t]hough the text of § 104(a)(2) might be considered ambiguous on this point, it is by now clear that § 104(a)(2) encompasses recoveries based on intangible as well as tangible harms." 115 S. Ct. at 2164 n.4. In many instances, punitive awards may compensate for actual loss that the law would not necessarily otherwise cover,[5] including intangible

5. Under Kansas law, for example, in a wrongful death case, nonpecuniary losses of the survivors are limited by statute to $100,000 per decedent, *i.e.*, if a parent is killed, no matter how many children survive, they as a group can collect only a maximum of $100,000 in nonpecuniary damages. *See* Kan. Stat. Ann. §60-1903(a). Furthermore, under Kansas law, children (Cont'd)

harms, or they may provide a source of funds to compensate the plaintiff's costs of litigation.[6] In *Burke*, this Court recognized that although the broad range of damages available in tort actions "often are described in compensatory terms, in many cases they are larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff, and thus redress intangible elements of injury . . . ." 504 U.S. at 235 (citations omitted).

Second, the Government's reliance on the unexceptional proposition that punitive damages also serve punitive and deterrent purposes, U.S. Br. 14-16, does not advance the analysis

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have no claim for loss of consortium with a parent who is injured but not killed by the tortious misconduct of another. *See Klaus v. Fox Valley Systems, Inc.*, 259 Kan. 522, 912 P.2d 703 (1996). *See generally Prosser and Keeton on Torts, supra*, at 9 ("Occasional decisions have mentioned *the additional purpose of reimbursing the plaintiff for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit*") (footnote omitted) (emphasis added); D. Dobbs, 1 *The Law of Remedies* 484 (2d ed. 1993) ("Perhaps the earliest of the modern punitive damages cases were based on a theory of compensation for intangible injury . . . . [O]bservers often believe that added compensation . . . for elements of harm that are not readily calculated, is often one motive for 'punitive' damages awards") (footnotes omitted).

6. *See, e.g., Prosser and Keeton on Torts, supra*, at 12 (Punitive damages "have been defended as a salutary method of discouraging evil motives, *as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees*, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit") (footnotes omitted) (emphasis added); *The Law of Remedies, supra* at 282 ("The most practical reason to permit such awards is that they fund attorney fees for the plaintiff") (footnote omitted); *see also id.* at 482-84. The Kansas Supreme Court has expressly recognized such a purpose for punitive awards made under Kansas law. *See Brewer v. Home-Stake Production Co.*, 200 Kan. 96, 99-100, 434 P.2d 828, 831 (1967).

here. As this Court has recognized, "[u]nder the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider *the gravity of the wrong* and the need to deter similar conduct." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (emphasis added). *See generally* Restatement (Second) of Torts § 908, Comments b, c. Indeed, under Kansas law, the trier of fact historically was to consider "the nature, extent and enormity of the wrong, the intent of the party committing [the tort] and generally all the surrounding facts and circumstances" in determining the amount of any punitive award. *Hammargren v. Montgomery Ward & Co.*, 172 Kan. 484, 504, 241 P.2d 1192, 1207 (1952). Moreover, this Court has determined that, as a constitutional matter, both the propriety and the size of punitive awards depends in part on the nature and extent of the harm caused to the plaintiff.[7] The injury to the O'Gilvie Children's mother in this case legally (and obviously) "affected the amount" of the punitive damages award.

For all of these reasons, the natural reading of § 104(a)(2) is that the punitive damages award received in this case is excludable from taxable income. The O'Gilvie Children received punitive damages "on account of personal injuries" because, they are "attributable to" their mother's death, and her death "affected the amount" of the award.[8]

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7. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. __, 116 S. Ct. 1589, 1598-1603 (1996) (discussing the three "guideposts" for ascertaining the constitutionality of a punitive damages award under the Due Process Clause of the Fourteenth Amendment and identifying as the second guidepost "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award, *id.* at 1598); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

8. A number of scholarly commentators have reached the conclusion that the pre-1989 version of §104(a)(2) should be interpreted to exclude from taxable income punitive damages received in a personal injury/tort suit. In reaching that conclusion, these commentators have reviewed and analyzed

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C. The History Surrounding § 104(a)(2), Unlike The Administrative History On Which The Government Largely Relies, Further Demonstrates That Congress Intended What The Statute Plainly Declares

The Government attempts to piece together what it questionably labels the "legislative history" of § 104(a)(2), *see* U.S. Br. 18-20, in support of the Government's current reading of the statute. Only the House Report the Government cites is truly "legislative history" and it does not support the weight the Government would place on it. Indeed, the quoted portion of that report simply declares that "amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, *and damages received* on account of such injuries or sickness," *id.* at 19 (quoting H.R. Rep. No. 767 at 9-10 (1918) (emphasis added)), are excludable. The report, like the statute itself, does not say only "compensatory damages received" are excludable. Instead, again like the statute itself, the report is most naturally read as distinguishing payments received under insurance policies or worker's compensation systems from payments received in an ordinary tort suit. The report, like the statute, treats these categories disjunctively. The Government repeatedly contends that the report and the statute's reference to "compensation" modifies both the categories of insurance or workers' compensation and personal injury lawsuits. Such a reading, however, is contrary to the plain language of the statute, as well

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extensively the text of the original and subsequent versions of the statute, the history and legislative history behind the statute, the tort and tax policies implicated by the statute, and the 1989 amendments. *See, e.g.*, Cohen-Whelan, *From Injury to Income: The Taxation of Punitive Damages "on Account of" United States v. Schleier*, 71 Notre Dame L. Rev. 913, 944-52 (1996); Comment, *I.R.C. Section 104(a)(2): IRS Above The Law?*, 25 Sw. U. L. Rev. 461 (1996); Serven, *The Taxation of Punitive Damages: Horton Lays an Egg?*, 72 Denv. U. L. Rev. 215 (1995); Morgan, *Old Torts, New Torts and Taxes: The Still Uncertain Scope of Section 104(a)(2)*, 48 La. L. Rev. 875 (1988).

as the legal background against which the statute was enacted.

The statute originally enacted in 1918 provided the following exclusion from taxable income:

> Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness. Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057, 1066 (1919).

The statute at issue in this case is unchanged with respect to the operative language "on account of," but it is now two subsections instead of one, with the result that the contrast between workers' compensation and insurance on the one hand, and a personal injury suit, on the other, has been somewhat obscured.

In tort law, there is a clear and obvious reason why Congress originally intended to distinguish between insurance or workers' compensation on the one hand and tort/personal injury lawsuits on the other. Workers' compensation generally did not exist until the early twentieth century.[9] Under traditional tort law, the liability of employers to employees was greatly limited by doctrines such as contributory negligence, assumption of the risk, and the fellow servant rule.[10] Employees under workers'

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9. *See, e.g., Prosser and Keeton on Torts, supra* at 573 (pointing out that the first state workers' compensation statute was enacted by New York in 1910 and "[b]y 1921 all but a few of the American states had enacted such legislation"); Rabin, *Some Reflections on the Process of Tort Reform*, 25 San Diego L. Rev. 13, 17 (1988) (the author "identifies workers' compensation as one strand in a broader pattern of legislative activity associated with the Progressive Era").

10. *See, e.g., Prosser and Keeton on Torts, supra* at 573 (describing the "three wicked sisters of the common law"); *Pomer v. Schoolman*, 875 F.2d 1262, 1265-67 (7th Cir. 1989) (Posner, J.) (discussing the history of the fellow-servant rule and its demise with the advent of workers' compensation).

compensation systems are entitled to compensation for injuries received on the job without having to establish any fault on the part of either employers or fellow employees (or the injured employee's own lack of fault).[11] Thus, workers' compensation often is referred to as a "no fault" or strict liability system of compensation.[12] In exchange for the preceding benefit, however, employees subject to workers' compensation generally receive predetermined or relatively fixed amounts for various types of injuries, and they cannot recover any punitive damages.[13] Generally, they also relinquish the right to sue their employer in tort for injuries suffered in the course of employment.[14] For these reasons, workers' compensation is administratively efficient but, for an employee who otherwise would have a meritorious tort claim, the compensation often may be insufficient to cover actual losses.[15]

This history has a bearing on the interpretation of § 104(a)(2) in that it explains the background against which Congress enacted the statute in 1918 and it provides a clear and logical reason why Congress chose to distinguish between insurance or workers' compensation on the one hand and traditional tort/personal injury suits on the other. The key is that under workers' compensation, as well as most individual insurance policies, the *only* recovery is for *compensatory*

11. *Prosser and Keeton on Torts*, *supra* at 573.

12. *Id.* ("Workers' compensation is thus a form of strict liability").

13. *Id.* ("in most cases the compensation is fixed by the statute itself") (footnote omitted).

14. *Id.* at 574 ("When an injury to a servant is found to be covered by a workers' compensation act, it is uniformly held that the statutory compensation is the sole remedy, and that any recovery against the employer at common law is barred") (footnote omitted).

15. *Id.* ("It is recognized that this remedy is in the nature of a compromise, by which the worker is to accept a limited compensation, usually less than the estimate which a jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid").

damages. No punitive or other type of damages are recoverable under workers' compensation, nor under an individual's medical or disability insurance policies. The same obviously is not true of traditional tort/personal injury suits. Thus, in 1918, Congress logically intended to draw a distinction between the two categories and treat them differently for taxation purposes. A natural reading of the statute, one which takes into account both that the phrase "as compensation for personal injury or sickness" immediately follows and thus apparently modifies the references to insurance and workers' compensation and that the language "*plus* the amount of *any* damages" which corresponds to amounts received in a tort/personal injury suit,[16] is completely consistent with the status of workers' compensation and traditional tort law as both existed in 1918.[17]

The Government makes two other "legislative history" arguments which merit only brief attention. First, the Government contends that this Court already has reviewed "much of this same legislative and administrative history in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955)," U.S. Br. 20, and reached the conclusion the Government wants

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16. Petitioners' suggested reading of the statute thus does not, as the Government suggests, "tear asunder words that the statute has joined together." U.S. Br. 27. Only by ignoring the significance of the commas located within the 1918 statute, as well as principles of grammar, can the Government contend that the "as compensation" phrase was intended to modify the later reference to "any damages received" in a tort/personal injury suit.

17. Large punitive damages awards are a modern phenomenon, as members of this Court have remarked on recent occasions. *See, e.g., Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing"). Thus, it is unlikely that in 1918 Congress was at all concerned that § 104(a)(2) would exclude from taxation punitive damages awards received in tort/personal injury cases. The fact that punitive damages awards today are larger than in 1918, however, cannot change the language Congress enacted in 1918 or the intent behind the statute.

the Court to reach in this case. The Government's discussion of *Glenshaw Glass*, however, is misleading. As explained in petitioners' opening brief, in *Glenshaw Glass* the Court was asked to decide whether a treble damage award made under federal antitrust law constituted "gross income" within the meaning of § 61(a) of the Internal Revenue Code. This Court simply held that it did. *Glenshaw Glass* did *not* involve the interpretation of the predecessor to § 104(a)(2). From reading the Government's discussion of the case, however, one might be left with the impression that the § 104(a)(2) issue has been settled for over 40 years.

Second, the Government suggests that *subsequent* history, in particular the title of the statute ("Compensation for injuries or sickness") which did not accompany the statute enacted in 1918 and which was not added to the statute until the first codification of the revenue code *in 1939, twenty-one years later*, should be accorded controlling weight in ascertaining the meaning that Congress intended in 1918. *See* U.S. Br. 22 n.7. To state the argument is to refute its significance. The Government itself observes later in its brief that, "[a]s this Court frequently has emphasized, 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Id.* at 29 n.9 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).[18]

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18. The Government also contends that, under this Court's decision in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and subsequent cases, the IRS's current interpretation of § 104(a)(2) is entitled to deference. U.S. Br. 25-26. The Court expressly rejected this argument in *Schleier*, less than two years ago, in precisely the context of interpreting § 104(a)(2) and the IRS regulations implementing the statute. The Court held that "[i]n view of the Commissioner's differing interpretations of her own regulation, we do not accord her present litigating position any special deference." *Schleier*, 515 U.S. at __ n.7, 115 S. Ct. at 2166 n.7. That holding is just as appropriate, if not more so, in this case. Although the Government concedes that the IRS "has, over time, expressed differing views," U.S. Br. 25, regarding § 104(a)(2), the Government nonetheless contends that the IRS has (Cont'd)

II. THE GOVERNMENT'S SUIT TO RECOVER THE REFUNDS MADE TO THE O'GILVIE CHILDREN WAS UNTIMELY

A. The O'Gilvie Children Are Entitled To Raise The Statute Of Limitations

The Government commences its argument on the question whether its refund suit against the O'Gilvie Children was timely under 26 U.S.C. § 6532(b) by asserting, *for the first time in either this Court or the Tenth Circuit*, that the children are precluded from raising this issue and that the Court is precluded from deciding the issue. *See* U.S. Br. 35-37. The Government's position lacks merit for several reasons. First, the Tenth Circuit addressed the statute of limitations issue on the merits without any mention of or reference to potential preclusion questions. *See* Pet. App. 8a-10a. When a court of appeals reaches an issue on the merits, this Court has the power to do so as well.[19]

Second, the Government clearly has waived any right to object to this Court's consideration of the issue. In its brief in opposition to the O'Gilvie Children's petition for a writ of certiorari, the Government failed to raise any such objections.

(Cont'd)
endorsed a consistent interpretation since 1984. U.S. Br. 25. This statement, of course, ignores the fact that the IRS *approved and paid* the O'Gilvie Children's refund requests *in 1990*. Perhaps the IRS has had a consistent "official" interpretation of § 104(a)(2) since 1984, but this case is proof that there has been no such consistency in practice. For these reasons, the interpretation of § 104(a)(2) which the IRS now purports to endorse in this Court is not entitled to deference.

19. "Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981); *Stevens v. Department of* Treasury, 500 U.S. 1, 8 (1990); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. __, __, 115 S. Ct. 961, 965 (1995).

This Court's rules clearly state that "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2. Indeed, this Court has made clear on more than one occasion that the:

> decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for a writ of certiorari . . . .

Oklahoma City v. Tuttle, 471 U.S. 808, 816 (emphasis in original); *Canton v. Harris*, 489 U.S. 378, 385 (1989) (same).

Lastly, the Government weakly argues that the O'Gilvie Children are trying to raise "new factual contentions on appeal," U.S. Br. 37 n.13, which the Government further contends are contrary to the stipulation the parties entered in the District Court. In addressing the statute of limitations issue, however, the O'Gilvie Children have not disputed any facts, nor attempted to inject any new facts into this Court's consideration of the question. Rather, they simply seek to have this Court interpret the meaning of the phrase "within 2 years of the making of such refund" as it is used in § 6532(b). That is obviously a legal question which is not subject to resolution by stipulation of the parties. The only relevant facts — none of which are in dispute — are that (1) the O'Gilvie Children received the refund checks on July 9, 1990, (2) the Government filed this suit for recovery of the refunds on July 9, 1992, and (3) the Government issued and mailed the refund checks prior to July 9, 1990. A stipulation that the amounts were "refunded" on July 9, 1990, is not inconsistent with the proposition that the refunds were "made" prior to that date.

B. The Two-Year Limitations Period Begins To Run On The Date The Government Either *Issues* Or *Mails* A Refund Check

The Government urges this Court to read the phrase "the making of such refund" in § 6532(b) to mean either (1) the date on which the taxpayer *receives* the refund or, implicitly, (2) the date the refund check is cashed and the taxpayer actually collects the funds. U.S. Br. 35-41. Petitioners question, however, whether the Government seriously desires a statute of limitations rule — applicable to suits brought *by the Government* — which is triggered by a date that is beyond the Government's control and often will not be readily ascertainable by the Government. Thus, other than its obvious and immediate interest in prevailing in this case, it is not apparent why the Government should desire the interpretation of § 6532 which it has proposed to this Court.

1. *The Plain Language of § 6532(b) Does Not Support the Government's Reading of the Statute*

Section 6532(b) requires the Government to file a suit for recovery of an erroneous refund "within 2 years after the making of such refund." The key word is "making," which, in this context could mean (1) the date on which the Government officially *approves* the refund, (2) the date the Government *issues* the check, (3) the date the Government *mails* the check, (4) the date the taxpayer *receives* the check, or (5) the date the check *clears* the Treasury. The Government urges the Court to adopt the fourth option, although the rationale of the Government's argument — that a refund is not "made" until the Government could sue to recover it — really leads to the conclusion that the fifth option is the rule the Government seeks.

The plain language of § 6532(b) certainly does not suggest the fourth or fifth options as the appropriate interpretations. Indeed, Congress could have written § 6532(b) to trigger the Government's two-year limitations period on the "receipt by the

taxpayer" or the "clearing of the refund check." It pointedly chose neither of those phrases.

Petitioners recognize that this Court, in *United States v. Wurts*, 303 U.S. 414 (1938) (the only case in which this Court has interpreted § 6532(b) or one of its predecessors), rejected the first option — that the statute is triggered on the date the Government officially *approves* (or "allows") the refund. In doing so, however, the Court equated the *mailing* of the refund with "actual payment." 303 U.S. at 415. Specifically, the Court described the facts as follows:

> March 15, 1932, the Commissioner erroneously approved a refund of taxes paid by respondent for the year 1929. April 30, 1932, a check *was mailed* to the taxpayer for this erroneous refund. April 26, 1934, more than two years after the allowance of the refund, *but less than two years after actual payment*, the Government brought this suit to recover the erroneous refund. 303 U.S. at 415 (emphasis added).

These facts make clear that, in *Wurts*, this Court equated the word "making" as used in the statute with the "mailing" of the refund check, precisely the interpretation petitioners suggest in this case. *See also id.* at 418 (repeatedly referring to the "making" of the refund as the date of "payment" without further elaboration). Thus, *Wurts* implicitly decided the issue presented in this case, and held that the date of mailing is the date of the "making" of the refund. The Government's suit against the O'Gilvie Children therefore is time-barred.[20]

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20. Even if this Court were to conclude, however, that *Wurts* did not decide that the date of mailing is the relevant date, there is no support for the assertion that *Wurts* decided which of the four remaining options triggers the running of the statute. In fact, the Court did not need to specify which of the remaining options triggers the statute because the Government's suit in *Wurts* was untimely only if the trigger date was the date on which the Government *approves* the refund, *i.e.*, the first option of the five listed above.

2. *Practical Considerations Support A Rule That a Refund is "Made" Either When the Government Issues or Mails a Refund Check*

Observing that petitioners argue "that treating a 'mailing' as if it were a 'refund' would be supported by common sense and by 'practical' considerations," U.S. Br. 41, the Government responds that "[i]n fact, however, common sense and practicality point the other way." *Id.* The Government then offers two hypotheticals which apparently are intended to illustrate the patent correctness of the Government's position:

> If, as petitioners assert, a "refund" is made simply by the act of placing a check in the mail, the Commissioner arguably could recover an erroneous "refund" even if the check were lost and never actually received by the taxpayer. The Commissioner could also refuse to issue a replacement refund check even if it were established that, after mailing, the original refund check was destroyed through no fault of the taxpayer. Neither of these results would comport with common sense. *Id.*

With all due respect to the Government, neither hypothetical makes *any* sense.

If a refund check has never been deposited or cashed by the taxpayer, or has never cleared the Treasury, there is simply *no* reason for the Government to file a suit to recover the refund. The Government's remedy in those circumstances is simple: *stop payment*.[21] If the taxpayer has never drawn on the funds behind

21. This is the same flaw present in the Tenth Circuit's resolution of this issue below. The Tenth Circuit, like the Government, opined that "the government could not have brought suit to recover the refund until the taxpayers had received the refund checks . . . ." Pet. App. 10a. Although that may be true, the argument ignores the fact that the Government's remedy prior to the time a refund check is cashed is the simple one of stopping payment on the check.

the refund check, as in the Government's first hypothetical above, why would the Government want to go to the trouble and expense of filing a refund recovery suit under § 7405? Likewise, petitioners fail to see how the Government legally could refuse to issue a replacement check in the circumstances of the second hypothetical. If the Government feared that the "lost" refund check might in fact eventually appear in the hands of someone who would attempt to cash it, the Government's protection is the relatively simple procedure of stopping payment on the first check.

By contrast, petitioners' proposed interpretation of the statute, that the trigger date is either the date on which the Government (1) *issues* the refund check (which should appear on the face of the check) or (2) *mails* the check to the taxpayer, has much to commend it in terms of common sense and simplicity. Because the claim at issue here belongs to the Government, it makes sense to interpret the statute as commencing to run on one of these dates, either of which should be easily ascertainable by the Government.[22] It seems odd to trigger the two-year period of

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22. Although the Government would have this Court believe that the O'Gilvie Children's proposed interpretation of § 6532(b) is novel and unprecedented, even a moment's reflection reveals other legal rules that operate along the lines petitioners suggest. For example, probably every lawyer can recall learning the "mailbox" rule in a first-year contracts class. Under this longstanding rule, an acceptance made in writing is deemed effective, *i.e.*, a legally binding contract is formed, when the acceptance is placed *in the mail*, not when the offeree or offeror actually *receives* it, or receives payment from the offeree, or takes some other action based on the acceptance. *See generally* E. Farnsworth, *Contracts* 180-81 (2d ed. 1990). This rule rests "on the simple assumption that there must be a single moment that is decisive in all cases." *Id.* In fact, the rule has been used to justify finding a legally binding contract even when, for some reason, the acceptance was lost and never reached the offeror. *Id.* at 184. The Restatement (Second) of Contracts § 63, Comment b. justifies this application on the grounds of "simplicity and clarity." The same grounds apply with considerable force to the statute of limitations issue now before the Court.

§ 6532(b) by reference to an event over which the Government does not have control, such as the taxpayer's *receipt* of the check, and which the Government may — as a practical matter — have a difficult time ascertaining. The uncertainties of the speed of mail delivery, the possibility of lost mail, the limitless possibilities of taxpayer conduct after mailing (*e.g.*, a taxpayer on an extended vacation or a taxpayer who has moved so that the Government does not have the taxpayer's current address), and the likelihood that most taxpayers do not even keep records of the date on which they receive pieces of mail, all counsel against an interpretation of § 6532(b) that depends upon a date not readily ascertainable by the Government or, in some cases, even by the taxpayers themselves.

Indeed, it would be foolhardy for the Government to file suit to recover an erroneous refund any later than two years after the date the refund was mailed and thus risk learning during discovery that the suit is untimely because the taxpayer received the check sooner than the Government expected. Rather, the prudent practice would be for the Governement to file suit within two years of the mailing of the check, as it did in *Wurts*. Petitioners' interpretation of the statute would greatly simplify its administration and minimize the likelihood of disputes arising as to its application in particular cases, thus avoiding unnecessary and costly litigation such as this case.

CONCLUSION

For the reasons stated above, as well as in the petitioners' opening brief, petitioners respectfully request that the Court reverse the Tenth Circuit, and hold that the Government's refund suit was untimely or, in the alternative, that the punitive damages award in this case was not taxable.

Respectfully submitted,

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